COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF BAY STATE GAS COMPANY
FOR APPROVAL OF REVISED TARIFFS **DTE 05-27**

REPLY BRIEF OF LOCAL 273, UTILITY WORKERS UNION OF AMERICA

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TABLE OF CONTENTS

I. INTRODUCTION

Local 273 of the Utility Workers Union of America ("Local 273") filed its initial brief on August 31, 2005. Bay State Gas Company ("Bay State" or "Company") filed its initial brief on September 14, 2005. By order of the Hearing Officer dated September 19 ("Revised Reply Briefing Schedule"), any reply from an intervenor is due September 26. Local 273 hereby files this reply.

Local 273 notes that its failure to reply to any specific issue briefed by the Company should not be read as either acquiescence to the Company's argument or waiver of Local 273's own initial argument. Local 273 went to great lengths to provide detailed citation to (and often quotation of) the record evidence to support its arguments.[1] In many instances, Bay State has responded with little more than argument of counsel. In general, Local 273 will not reply here to Company arguments made without adequate record support.

II. BAY STATE DID MISREPRESENT THE EFFECTS OF THE MERGER

In its initial brief (pp. 11-12), Bay State disagrees with Local 273's argument (Init. Br. pp. 11-14) that the Company misled the Department about the likely effects of the merger with NIPSCO/NiSource. Bay State's argument relies primarily on the fact, undisputed by Local 273, that the massive layoffs implemented by NiSource did not begin until 2000[2] and did not have a

[1] *See, e.g.,* Local 273 Init. Br. pp. 11-13, providing citations to and quotations of the record regarding the contrasts between Bay State's original representations of the effects of the merger and the actual effects of that merger.

[2] The 2000 staffing level was 767, a decline of 38 (5%) from the 1999 staffing level of 805. Exh. UWUA 1-1(A).

very significant impact until 2001.[3] The Company ignores the key fact that it took approximately two years before NiSource effectively exerted control over the staffing level decisions at Bay State. Thus, as a practical matter, NiSource could not have reduced staff much earlier than 2000, given the lag time for a large, acquiring company to exercise control over the acquired company.[4] The radical disjuncture between the rosy promises Bay State witness James Simpson made in the merger case about maintaining staffing, facilities and operations and the post-merger results cannot be as glibly dismissed as the Company would like.

Moreover, Bay State responds not at all to Local 273's points that the Company misled the Department about *increasing* its efforts to promote sales growth;[5] keeping its "management structure and organizational structure intact;"[6] and maintaining investment in its system.[7]

While Bay State's misrepresentations about the merger were made well in the past, they deserve close scrutiny given the Company's similarly optimistic projections about the benefits of the IBM outsourcing contract and the need for and benefits of the SIR program.

III. BAY STATE HAS NOT BEEN CANDID ABOUT THE IBM OUTSOURCING

The Company similarly disagrees with Local 273's argument that it has not been candid

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[3] The 2001 staffing level of 675 was 102 (13%) below the 2000 level. Exh. UWUA 1-1(A).

[4] Tr. 1626, 1627 (Q: "At what point after the merger did NiSource begin to effectively exercise control over things like staffing levels?" A: [Mr. Bryant] "I would say probably 2001").

[5] Instead, it slashed its sales force. Local 273 Int. Br. p. 12.

[6] The management structure has been even more decimated than the unionized workforce. Local 273 Init. Br. p. 12.

[7] Local 273 Init. Br. pp. 13-14.

about the likely impacts of the signing of the IBM contract on Massachusetts-based operations. *Compare* Company Init. Br. pp. 13-14 *with* Local 273 Init. Br. pp. 14-16. The Company sets up a straw man to knock down by pointing out that Mr. Bryant talked about the IBM contract as early as his pre-filed testimony (Init. Br. p. 14), as if any party questioned that.

Local 273's somewhat different and larger point is that Bay State tried throughout the proceeding to downplay the impact that the signing of the contract will have on the operations of the Springfield call center and Brockton billing office, on service quality, and on staffing levels.[8] Local 273 Init. Br. pp. 14-16. In Local 273's view, the fact that Bay State agreed to the union's Motion to Preserve Status Quo (Company Init. Br. p. 13) should heighten the Department's concern that NiSource intends to go ahead with massive reductions shortly after a decision issues in this case; the Company is simply trying to avoid a decision in this case on the merits of the outsourcing plan. Local 273 believes that the Company would not have agreed to such a largely unprecedented motion[9] unless it was concerned that the Department might in fact grant the motion and equally concerned that any layoffs effected during the course of the case would increase the likelihood of an adverse ruling by the Department on staffing level and outsourcing issues. As discussed below, the Department should address the staffing level issues in this docket.

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[8] As Local 273 noted, Init. Br. p. 16, "the Department should be under no illusions" about the near-certainty that Bay State will outsource "all the work done at the Springfield call center and Brockton billing office" despite statements from the Company's witnesses that these issues remain to be decided. In fact, only the details of how and when this will be done are undecided, unless the Department restricts the Company's planned outsourcing.

[9] While Local 273 believes its Motion was well-founded in both law and fact, it also recognizes that there is no well-established precedent for the Department prohibiting a company from laying off employees in connection with the signing of an outsourcing contract.

Regarding the IBM contract, the Company argues that "the record is replete with evidence" that NiSource and Bay State "engag[ed] in a diligent investigation into the positive and negative aspects of an agreement with IBM." Init. Br. p. 14 (emphasis added). But the "replete" record that Bay State cites is nothing more than a short, unsupported conclusion from Mr. Bryant.[10] The record, however, is replete with evidence of how little Mr. Bryant or anyone at Bay State knows about the IBM contract and how little anyone at Bay State will be involved in the major decisions to implement the contract.[11] There was simply no witness in the case who could address the many legitimate questions raised by Local 273 as well as by the Attorney General and the Steelworkers about the IBM outsourcing contract.

IV. STAFFING CUTS HAVE IMPACTED SERVICE QUALITY, AND THE DEPARTMENT MUST SET STAFFING LEVELS TO PROTECT CONSUMERS

Bay State admits that:

> staffing cuts were initiated in order to determine the level of staffing required to maintain service quality at the most efficient and economic levels while introducing certain new technologies designed to serve customers.

Init. Br. p. 15. The Company further acknowledges that "when service quality deteriorated and penalties were assessed, Bay State took action to correct the problem." *Id.* Local 273 is pleased

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[10] The only record cite Bay State provides is Tr. 3311 ("There were dozens of people involved in -- as I described earlier, in generally determining just what should be encompassed in an outsourcing agreement, and then considerable work on who could provide those types of services, and then a very long, careful process of selecting an appropriate vendor.").

[11] *E.g.,* Tr. 182 (On July 5, Mr. Bryant could not even state whether contract had been signed; admitted to being "out of the loop" regarding IBM contract; stated neither he nor anyone at Bay State was involved in the IBM negotiations); Tr. 1696-97 (Mr. Bryant will not be involved in negotiations over which jobs will be outsourced); Tr. 3333 (Mr. Bryant had not reviewed any documents evidencing that NiSource had performed its due diligence); Tr. 3235 (Mr. Bryant had not reviewed the contract prior to its signing). *See also* Exh. RR-USWA-11, RR-USWA-13.

that the Company has admitted two of the key theses of the union's brief. First, the Company admits that it was, in effect, testing the lower limit of how far it could cut staff before this would result in noticeable degradations of service quality. This is one of the recurring points in Local 273's brief.[12]

Second, Bay State acknowledges that it took the imposition of penalties by the New Hampshire PUC to reverse the staff cuts at the Springfield call center that so adversely affected service quality. This is another one of Local 273's central points: Bay State will allow its service quality to deteriorate in the absence of very strict supervision by the Department or other state agencies that regulate Bay State's affiliate Northern Utilities.

Curiously, Bay State does not rebut Local 273's argument (which contains extensive citation to relevant statutes and Department decisions, Init. Br. pp. 56-59) that the Department, as a matter of law, must adopt staffing levels for Bay State, other than to state that "Bay State does not agree that the Department has such a duty." Company Init. Br. p. 23. Rather, Bay State points to the generic docket DTE 04-116 as its preferred forum for setting the Company's staffing levels. Local 273 notes that neither it nor any other "party"[13] in DTE 04-116 has been offered any opportunity to address the staffing level requirements of G.L. ch. 164, § 1E, a fact of

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[12] To provide just a few examples, Local 273 cited (1) e-mails from Mr. Bryant bemoaning the "bad news" that "all the training in the world does not make up for lack of staff" (Init. Br., p. 20, citing Exh. UWUA 1-2(D)); (2) his testimony that "call-center staffing" cuts had gone too far (Init. Br. p. 20, citing Tr. 1625); and (3) the direct connection between NiSource's acquisition of Columbia and its subsequent disinvestment in Bay State (Init. Br. 36, citing NiSource CEO Gary Neale's announcement of a hiring freeze shortly after acquiring Columbia).

[13] The word "party" is in quotes because DTE 04-116 is not an adjudicatory proceeding where the filing of petitions to intervene was allowed. No one other than the Department has been given the right to conduct discovery or examine witnesses.

which the Company is well aware. During the two days of technical sessions held in DTE 04-116 on September 8 and 9, Bay State was not even present.[14] Bay State no doubt suggests DTE 04-116 as the appropriate forum for the setting of staffing levels because it is so unlikely that the Department will set specific staffing levels for specific companies in that case, even if there may be an order generically addressing how staffing levels should be set in future filings.

Given the unique staffing level problems at Bay State as well as the fact that almost eight years have passed since the legislature adopted the staffing level requirements of G.L. ch. 164, § 1E, the Department should not further defer the setting of staffing levels for Bay State.

V. THE DEPARTMENT SHOULD ORDER A MANAGEMENT AUDIT

Bay State (Init. Br. p. 18) opposes Local 273's request that the Department open a management audit into (i) the sufficiency of the Company's Massachusetts-based management, including whether those local managers have adequate access to the capital and human resources they need to provide safe, high-quality and dependable service; (ii) the adequacy of call center and billing operations; and (iii) the risks posed by the planned outsourcing of the call center, billing office, and other functions. Local 273 Init. Br. pp. 59-60. In a somewhat parallel vein, the Attorney General calls for an investigation into the accuracy of the Company's annual service quality filings and corporate management, AG Init. Br. pp. 124-125.

Local 273 will only briefly note here some of the factual bases for its call for a management audit, many of which were completely uncontested in the Company's brief and which therefore should be accepted as true by the Department:

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[14] The Department could take administrative notice of its own docket in DTE 04-116 and the fact that Bay State did not appear on those dates, under 220 C.M.R. 1.10(2).

- The Company's capital expenditures declined significantly in the four-year period 2000 to 2003 (Local 273 Init. Br. p. 13), the period when NiSource had complete control over investment decisions. This fact gives rise to the need for an audit of Massachusetts-based management and whether Bay State has access to sufficient capital from NiSource.

- The Company concedes (Init. Br. p. 18) that "reductions in staffing resulted in service issues in 2001," particularly at the call center, but alleges that these problems were subsequently addressed. Bay State, however, does not rebut Local 273's factual points that a trunk line was intentionally removed from service so that callers would receive a fast-busy signal (Init. Br. pp. 23-24); that the reported call-answering statistics overstate the percentage of calls that are actually answered promptly (Init. Br. p. 30); and that the "average time a customer waits in queue" actually increased significantly as recently as 2004 (Init. Br. p. 30). There are many other uncontested facts cited in Local 273's brief that form the basis for a management audit of the call center operations.

- Bay State has not rebutted any of the facts cited in Local 273's argument (Init. Br. pp. 47-56) that "there is little evidence that the IBM contract will benefit customers," other than to cite a two-sentence, unsupported opinion of Mr. Bryant that NiSource engaged in due diligence (Tr. 3311). In particular, Bay State does not dispute that the call center and billing office will be moved out-of-state under the IBM contract; that there has been a recent spate of companies that have undone their outsourcing contracts at great expense as those contracts proved not to work well for customers; and that the costs of cancelling the IBM contract would be quite large. These and other undisputed facts form the basis for a management audit focusing on the risks to customers of the proposed outsourcing.

VI. THE DEPARTMENT SHOULD SET A RETURN AT THE LOW END OF THE RANGE OF REASONABLENESS

Bay State (Init. Br. p. 214) opposes Local 273's request that the Department set a rate of return at the low end of the range of reasonable returns, but it does not in any way rebut Local 273's legal argument that the Department has the full discretion to do so (Local 273 Init. Br. pp. 16-18), nor its factual argument that neither Mr. Moul nor Mr. Newhard considered the quality of Bay State's management when offering their opinions on the appropriate level of the return that should be allowed (Init. Br. pp. 18-19).

Local 273 did not in its initial brief analyze in detail the testimony of Bay State witness Mr. Mohl and AG witness Mr. Newhard as to the appropriate return for Bay State, but fully

supports Mr. Newhard's recommendation of 8.66%, less 50 basis points to reflect sub-par management. However the Department itself sorts out the differences between Mr. Mohl's and Mr. Newhard's testimony, Local 273 continues to urge the Department to set the return at the low end of reasonableness for all of the reasons included in its initial brief, pp. 19-41.

VII. THE COST OF THE WESTBOROUGH OFFICE AND EXECUTIVE COMPENSATION SHOULD BE ADJUSTED; THE POSTAGE ADJUSTMENT SHOULD BE REJECTED

Bay State (Init. Br. p. 119) opposes Local 273s' request that the Department adjust the costs of the Company's Westborough offices as they are largely vacant. Bay State asserts that the office space is of "reasonable size," but this unsupported assertion is directly belied by extensive record evidence. The Westborough office may have been of "reasonabe size" when it housed 190 staff in 1998, but certainly cannot be considered of "reasonable size" when it housed 22 Bay State employees in the test year, augmented by a mix of some 20 or so part- and full-time NCSC employees. Local 273 Init. Br. p. 60. As Local 273's brief carefully details, per-employee office costs at Westborough soared from $10,510 in 2000[15] to $25,990 in the test year as a direct result of the Company paying for far more space than is reasonable for a radically diminished staff. Local 273 proposed an adjustment that would allow the Company to recover the 2000 per-employee office space cost of $10,510 (see n. 15) plus an increase of 10.95% to reflect the actual percentage increase in its lease costs from 2000 to 2004. The Department should not allow the Company to be compensated for excessive office space, especially where the excess space is a result of NiSource's conscious decision to reduce staff at the Westborough headquarters.

[15] Even this figure may reflect an excessive employee cost because the same offices that housed 190 Bay State employees in 1998 also housed only 138 employees in 2000. However, Local 273 is willing to treat the 2000 per-employee cost as a reasonable base. Init. Br. p. 61.

Bay State (Init. Br. pp. 101-103) also opposes Local 273's recommendation (Init. Br. pp. 62-65) that the Department disallow 50% of the costs of certain highly-compensated NSCS officers which are allocated to Bay State's customers. The only record citation in this portion of the Company's brief is to Tr. 2305-2308, for the purported proposition that "compensation packages for the NiSource offices [sic - 'officers'] are necessary to attract and retain top executives." However, were the Department to read those pages carefully, as Bay State apparently has not, it would be clear that Mr. Barkauskas was there describing how the salaries of "Mr. Cote" and the "presidents" of other NiSource operating companies were set. Those pages of the Barkasukas testimony do not address how the salaries for top-level NiSource executives whose costs are assigned to Bay State were set. Local 273 does not question that Mr. Cote's salary should be assigned to Bay State, as he is the Company's General Manager and his salary is in fact quite reasonable in light of the exorbitant amounts other NiSource officers are paid. Local 273 also has no reason to question the compensation of the other operating company presidents referenced in Mr. Barkauskas's testimony as not a penny of their salary is assigned to Bay State. Confidential Exh. UWUA 2-11(d), lines 10, 12, and 14 (showing "0%" as the portion of these officers' compensation allocated to Bay State). Bay State cites no record evidence, nor is there any, as to the reasonableness of the compensation packages of NiSource executives whose costs are allocated to Bay State and whose compensation is significantly higher than that provided to the operating company presidents. Confidential Exh. UWUA 02-11(d), lines 1-5, 7.[16]

The Company is asking the Department to take on faith that the very large compensation

[16] Without revealing any of the confidential amounts, Local 273 notes that the compensation of NiSource's CEO is more than 20 times larger than the most highly compensated Bay State officer; the latter officer is himself handsomely compensated. Exh. UWUA 2-11(d).

packages of the most-highly compensated officers whose costs are assigned to Bay State are in fact reasonable. The Company further asks the Department to trust that a 25% increase from 2002 to 2004 alone in the amount of executive compensation assigned to Bay State is reasonable. Local 273 Init. Br. pp. 63-64. Yet there is no record evidence to support either proposition; the Company has cited none. Further, the Company does not contest that when it finally complied with Local 273's information requests about executive compensation, there was an obvious $36,000 error in the allocation of the compensation of just one employee. Init. Br. p. 64 (citing RR-UWUA-9 (confidential)). There is no reason for the Department to accept the Company's proffered leap of faith. Instead, the Department should accept Local 273's proposed adjustment of excluding 50% of the executive compensation included in the cost of service, for the reasons stated, Init. Br. p. 65.

Finally, Local 273 wishes to address one other cost of service item. The Company seeks a postal adjustment of $69,947. Init. Br. pp. 106-107. The entire evidentiary basis of that adjustment is a United States Postal Service ("USPS") "news release notifying the public of this filing [seeking an increase in postal rates] and a separate news article." Exh. UWUA 3-20 (Mr. Skirtich). Upon cross-examination by Local 273, Mr. Skirtich acknowledged that he had not reviewed the results of any prior USPS request to increase rates to determine "if that proposed increase ever went into effect or . . . the lag between the proposal and the time it went into effect." Tr. 525-526.

This is not a known and measurable change to test year expenses that should be reflected in rates. It is speculation based upon a press release where the Department has no basis for concluding that the postal increase will go into effect at all, or at any particular time in the future.

Under 39 U.S.C. § 3622(a), the USPS may "from time to time . . . request the Postal Rate Commission," which is itself an "independent establishment of the executive branch" under 39 U.S.C. § 3601, to submit a recommended decision on changes in a rate or rates of postage" to the Board of Governors ["Governors"] of the USPS. The Postal Rate Commission has "10 months after receiving any such request from the Postal Service" to render a recommended decision to the Governors, and in some cases more than 10 months. 36 U.S.C. § 3624(c)(1) & (2). The Governors then "may approve, allow under protest, reject or modify that decision." 39 U.S.C. § 3625. There is also provision for subsequent judicial review in certain instances.

The Company's adjustment should be rejected as speculative. There simply is no evidence as to when, if ever, the postal increase announced in a press release will be acted upon or modified.

VIII. EVIDENTIARY AND PROCEDURAL ISSUES

A. The Department Must Accept Local 273's Testimony Regarding the Attleboro Explosion

Local 273 offered the testimony of three witnesses to describe concerns the union raised in conversations with Mr. Cote when the Company proposed outsourcing the function of locating gas lines in the Brockton division. Exh. UWUA-5, testimony of Kevin Friary, Brian McCarthy and Tim Leary. One reason Local 273 offered three witnesses on this point is that the union fully expected the Company to test the witnesses' credibility by filing discovery and through cross-examination, given the content and nature of their testimony. In short, the witnesses testified that they directly raised their concerns with Mr. Cote that the outsourcing company, Central Locating, might not perform the locating function well and that there might therefore be more "hits" on the

Company's lines by third parties excavating streets or other properties. Local 273 Init. Br. p. 34. The witnesses also testified that Mr. Cote replied to the union's conern that there would be more hits by stating that would be "a cost of doing business." Init. Br. p.p. 34-35, citing Exh. UWUA-5, p. 2.

Bay State now attacks the testimony as "undocumented hearsay" and speculates that all three witnesses, who consistently recall the same aspects of the conversation with Mr. Cote, somehow "misheard" Mr. Cote; have forgotten in whole or part what he said; or took it out of context. Company Init. Br. pp. 17-18, n. 10. This is a remarkable and legally impermissible tactic for the Company to take after having failed to file any discovery, cross-examine the witnesses, object to the testimony, or include direct rebuttal of Local 273's testimony in the rebuttal testimony filed by Mr. Cote and Mr. Bryant, Exh. BSG/Rebuttal-6.

As a general matter of evidence law, a party who fails to make a hearsay objection at the time the testimony is offered waives that objection. *See, e.g.*, *Commonwealth v. LaBonte*, 25 Mass. App. Ct. 190, 196 (1987). Here, the Company not only failed to object to the admission of Exh. UWUA-5, it affirmatively stipulated that the testimony could go in without cross-examination. Tr. 2693-2694. The Company cannot now be heard to object to the allegedly hearsay nature of the testimony. Local 273 even brought the witnesses to the hearing in the event any party, including the Company, decided at the last minute to conduct cross-examination. The Company chose not to do so. Tr. 2693-2694.

Further, the testimony is not hearsay. Local 273 is not introducing Mr. Cote's out-of-

court testimony for the truth of the matter stated,[17] that is, it is not offered to prove that having more hits on Bay State's line would be a "cost of doing business" for Bay State. It is irrelevant to Local 273's argument whether or not hitting lines would be a "cost of doing business." Rather, as made clear in Local 273's initial brief (p. 35), the statement is offered to prove Mr. Cote's intent and state of mind — that he intended to go ahead with outsourcing even in the face of Local 273's concerns that more lines would be hit by contractors. Under Fed. Rules Evid. 803(3) and a proposed (but never adopted) parallel state rule 803(3), "a statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design . . .)" is not deemed hearsay. *See Commonwealth v. Qualls*, 440 Mass. 576, 585 (2003) ("The testimony was not prohibited hearsay because it was not admitted for its truth, but to show the defendant's state of mind and possible motive"). In addition, Mr. Cote's statements, if they were hearsay, would be admitted as a statement by a party-opponent. "Any statement of a party is admissible against him if not objectionable on grounds other than hearsay." *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124, 137 (2002). The Department cannot discount witness testimony admitted without objection, based on the post-hearing speculations contained in the Company's brief.

B. The Department Should Reject the Company's Discovery Proposal

Bay State proposes that the Department consider limiting the number of information requests that a party can propound in a rate case, citing "federal civil practice" as a model. Init. Br. p. 97. The Company ignores certain key features of federal civil practice. First, there is no limit on the number of depositions that a party in federal litigation may take. F.R.C.P. 30.

[17] "The Hearsay Rule forbids the admission of evidence of extra-judicial statements offered to prove the truth of the matters asserted in the statements." W. Barton Leach & Paul J. Liacos, Handbook of Massachusetts Evidence 183 (4th Ed. 1967).

When Local 273 filed motions to allow depositions to "expedite the discovery process and reduce the amount of hearing time in the case" ("Notice and Motion for Depositions" dated June 2, 2005), the Company objected, noting the "almost unlimited opportunity to submit written discovery" and follow-up discovery (Company Opposition, p. 3, June 10, 2005). Bay State thus opposes the right of intervenors to take depositions and also seeks to limit the existing right to file extensive written interrogatories. Interrogatories are intervenors' only discovery tool since the right to take depositions in rate cases is virtually non-existent. The Company's proposal is at complete odds with federal practice.

Second, civil litigation allows for several months (or years) for parties to complete discovery. Here, the parties had a few weeks to submit all written discovery on a massive 11 volume initial filing. Company Init. Br. p. 91 (chart of filings and discovery). Intervenors could not possibly participate effectively in rate cases with no real right to depositions and only a limited right to written discovery. The Company's proposal should be rejected.

IX. CONCLUSION

Local 273 asks the Department to issue an order consistent with its recommendations in its initial brief and this reply brief.

Respectfully submitted,

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